Supreme Court, U.S.
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No. 94-2065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and ANNA SELLETTI, on behalf of themselves and all other similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health.

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

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PRELIMINARY STATEMENT

This brief responds to the brief in opposition filed by the respondents. The absence of a conflict among the courts of appeals, in and of itself, hardly warrants a denial of *certiorari*. In almost every case involving the constitutional rights of

institutionalized mentally disabled individuals pertaining to their confinement in which this Court granted *certiorari*, there was no conflict among the circuits. *See, Jackson v. Indiana*, 406 U.S. 715 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 1979); *Parham v. J.R.*, 442 U.S. 584 (1979); *Jones v. United States*, 463 U.S. 354 (1983); *Allen v. Illinois*, 478 U.S. 364 (1986); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Heller v. Doe by Doe*, _U.S. _, 113 S.Ct. 2637 (1993).[1] As in those cases, the issues presented by the petitioners are important and deserve plenary review by this Court.[2]

REASONS FOR GRANTING THE WRIT

THE CRITICAL ROLE PLAYED BY PSYCHIATRISTS IN THE COMMITMENT PROCESS WARRANTS A DETERMINATION OF WHETHER DUE PROCESS REQUIRES THE APPOINTMENT OF A PSYCHIATRIC EXPERT AS OF RIGHT.

This Court has recognized that psychiatrists are a necessity in the civil commitment process. *See Addington v. Texas*, 441 U.S. at 429 (psychiatrists and psychologists *"must"* interpret facts in commitment hearing) (emphasis added). Yet

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[1]Only in *Zinnermon v. Burch*, 494 U.S. 113 (1990) was there a conflict among the circuits. Such conflict existed with the issue of the applicability of *Parratt v. Taylor*, 451 U.S. 527 (1981), to deprivations effected by state officials who had the authority to provide predeprivation process. 494 U.S. at 116-117.

[2]In their brief in opposition, the respondents take pains to detail the status of the named petitioners. Because the district court certified this lawsuit as a class action (76a), the status of the named petitioners is irrelevant. *See, e.g., County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). However, it is worth noting that Lyle Goetz, who filed this lawsuit in 1988, remains confined. Mark Cans and Anna Selletti, who moved to intervene in 1989, remained confined until 1994 and 1993 respectively.

the Second Circuit found that a patient must first establish that the appointment of an expert is necessary for a reliable determination of a proceeding before a court is required to appoint an expert. Petition for *Certiorari* 29a.

The respondents' attempt to distinguish *Ake v. Oklahoma*, 470 U.S. 68 (1985), simply highlights the necessity of review by this Court. In *Ake*, this Court recognized that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or *liberty* at risk is almost uniquely compelling." 470 U.S. at 78 (emphasis added). The respondents offer no reason why the liberty of someone erroneously confined to a psychiatric hospital is any less compelling than that of a criminal defendant who faces incarceration.[3] This *certiorari* petition provides this Court with an opportunity to determine whether the layers of review in the commitment process, *Addington v. Texas*, 441 U.S. at 428-429, warrant the provision of significantly less protection to civil committees than that afforded to criminal defendants who raise the insanity defense.

While due process does not require that civil committees be provided with all the procedural protections that are afforded to criminal defendants, *see, Addington v. Texas*, 441 U.S. at 428, the respondents erroneously seize upon this distinction to argue that none of the protections in a criminal proceeding pertain to the civil commitment process. Respondent's Brief in Opposition at 7. Certainly, due process requires the provision of some procedural protections that criminal defendants enjoy. *See, Addington v. Texas*, 441 U.S.

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[3]Indeed, while *Ake* involved the provision of expert assistance to a defendant facing the death penalty, the courts of appeals have universally held that the requirements of *Ake* apply to any defendant facing a deprivation of liberty. *See, e.g., United States v. Sloan*, 776 F. 2d 926, 928-29 (10th Cir. 1985); *United States v. Crews*, 781 F. 2d 826, 833-34 (10th Cir. 1986); *Dunn v. Roberts*, 963 F. 2d 308, 314 (10th Cir. 1992).

at 427 ("individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence"). The respondents cannot cite one case in which this Court addressed the provision of a procedural protection designed to enhance the accuracy of the commitment process, which is a component of procedural due process that is to be weighed against countervailing factors.

Furthermore, because *Addington v. Texas* addressed the appropriate standard of proof in a civil commitment hearing, which involves an allocation of the risk of error, 441 U.S. at 423, the availability of layers of review to correct errors in the commitment process does not itself justify dispensing with procedural protections that enhance the accuracy of the determination at hand. Rather, "an erroneous confinement should be avoided in the first instance." 441 U.S. at 428. Accordingly, when assessing the provision of expert assistance that is designed to enhance the accuracy of the commitment process, it is not relevant that it may not be much better to erroneously release a mentally ill individual than it is to wrongfully confine a mentally normal person.

The respondents' attempt to rely upon *County of Riverside v. McLaughlin*, 500 U.S. at 44 to minimize the legal significance of requiring petitioners to wait six weeks for a constitutionally acceptable hearing is equally unavailing. Apparently, the respondents believe that the "practical realities" that require a substantial degree of flexibility in a state's commitment procedures permit New York to delay commitment proceedings as much as six weeks. *See* Petition for *Certiorari* 5a. However, "flexibility has its limits." *County of Riverside v. McLaughlin*, 500 U.S. at 55. As such, this Court held that probable cause hearings are presumptively invalid if held more than forty-eight hours after arrest. 500 U.S. at 56-57.

Hence, *certiorari* is warranted to determine at what

point delays in the commitment process render the hearings presumptively invalid. At least nine lower courts have addressed the issue of how promptly a state must provide a civil committee with the opportunity to challenge his confinement. *See*, Petition for *Certiorari* at 22-23 (and cases cited therein). The opinions reached by these courts vary significantly. *See, e.g., Doremus v. Farrell*, 407 F. Supp. 509, 515 (D. Neb. (1975) (three-judge court) (hearing required within fourteen days); *Logan v. Arafeh*, 346 F. Supp. 1265, 1268-69 (D. Conn. 1972), (three-judge court) *aff'd. sub nom. Briggs v. Arafeh*, 411 U.S. 911 (1973) (hearing within forty-five days permissible). The significant differences in the lower court decisions further highlight the appropriateness of granting plenary review. Contrary to the assertions of the respondent, this case will have as much impact beyond Dutchess County as this Court's decision in *County of Riverside v. McLaughlin* had upon other counties who required defendants to wait more than forty-eight hours for a probable cause hearing.

Accordingly, the respondents fail in their attempts to characterize this lawsuit as an unremarkable case which contains issues that impact upon only Dutchess County, New York. Rarely, if ever, has this Court had the opportunity to address two issues that are so critical to the civil commitment process: the right of civil committees to what is a necessity in the commitment process -access to psychiatric assistance; and, the amount of time that a state may confine a civil committee before providing him with a constitutionally acceptable hearing. The latter issue also enables this Court to address the principles of *County of Riverside v. McLaughlin*, 500 U.S. at 44, in the civil commitment context. Either issue alone merits the granting of *certiorari*. Together, they provide this Court with a unique opportunity to significantly clarify the rights of individuals facing the "massive curtailment of liberty" that civil commitment entails. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980).

CONCLUSION

For the reasons given in this brief and the petition for *certiorari*, this Court should grant the petition for a writ of *certiorari*.

Dated: August 28, 1995
Huntington, New York

Respectfully Submitted,

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